BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

NEAL R. KING Claimant VS. **FUNK MANUFACTURING** Respondent AND **INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA** Insurance Carrier	)	Docket No. 1,024,194

ORDER

Respondent and its insurance carrier (respondent) requested review of the April 13, 2006, preliminary hearing Order entered by Administrative Law Judge Thomas Klein.

ISSUES

The Administrative Law Judge (ALJ) found that claimant's injury arose out of and in the course of his employment with respondent and that claimant gave appropriate notice of his injury to respondent. Accordingly, the ALJ found that claimant was entitled to temporary total disability benefits from July 27, 2005, until August 10, 2005, and authorized Dr. Christopher Boxell as the authorized treating physician for all treatment, tests, and referrals except referrals to rehabilitation hospitals.

Respondent requests review of the ALJ's finding that claimant's injury arose out of and in the course of his employment with respondent. Respondent also argues that claimant failed to provide timely notice to the respondent of a work-related accident.

Claimant asserts that the ALJ correctly determined that his injury arose out of and in the course of his employment with respondent. Claimant also contends that his notice of injury to the employer was appropriate as he attempted to telephone respondent within the 10-day period to let it know he had a work-related injury, but his telephone calls were not returned. In the alternative, claimant argues that he meets the just cause rule contained in K.S.A. 44-520 in that he was not sure of the extent of his injury and what was

wrong with his back until he received the results of an MRI and learned he had a herniated disk.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the record presented to date, the Board makes the following findings of fact and conclusions of law:

Claimant is 32 years old, 5 feet 6 inches tall, and weighs 135 pounds. He worked for respondent for seven years, first as a welder and since 2001 as a machinist. When he first became a machinist, he worked in a cell where the parts he lifted weighed between 40 to 125 pounds. Claimant alleges that he injured his low back at work on April 22, 2005, by "repetitive heavy lifting."[1] At the time he injured his back, he was in a cell where the parts weigh from 30 to 80 pounds. Production in that cell is 6 or 7 parts an hour and usually run from 40 to 50 parts a night. He would pick up each part about nine times.

Claimant had a pre-employment physical in March 1998 before starting work at respondent. An x-ray taken then showed narrowing at L4-5 and L5-S1. The report noted that the narrowing at L5-S1 could be developmental, but the narrowing at L4-5 was probably disk degeneration.

Claimant stated that about six to eight months before he was off work, he began having pain in his lower back, which he attributed to muscle soreness from work. He worked the third shift, from 11 p.m. to 7 a.m. On Friday, April 22, 2005, he got off work and felt sore muscle pain in his low back. He and a friend went turkey hunting, which he testified consisted of walking down a road, standing there for 10 minutes, and walking back out. They did not shoot any turkeys. They then drove to claimant's home, where they stood in the yard and visited awhile. Claimant then went into his house, took a shower, and went to bed. When he woke up that evening, he had excruciating pain in his low back radiating into his hips and down his left leg. He had planned to go to work that evening but was in too much pain. However, he did not call in because working that weekend was voluntary. He called in on Sunday evening, April 24, and told his supervisor, Dennis McCorter, that he would not be in and that he had a doctor's appointment the next day, April 25. He did not report a work-related accident or injury during that telephone conversation with his supervisor. Instead, at the October 19, 2005, Preliminary Hearing, claimant testified he told his supervisor:

> I was going to go see the doctor on Monday and that I wouldn't be in and as soon as I heard from the doctor, you know, figured out what was wrong or what was

[1] Form K-WC E-1 Application for Hearing filed July 27, 2005.

> going on I would get back with them and let them know what was going on but I would not be there Monday.[2]

On April 25, claimant saw a nurse practitioner at the office of Dr. William Fesler, his family physician, who sent him for an MRI and gave him an off-work slip and some pain pills and anti-inflammatory medication. He called his supervisor the next day and talked to his supervisor about the off-work slip and told him he was scheduled for an MRI. Again, claimant made no mention of his condition being work related. On May 2, he was told that the MRI showed he had a herniated disk at L5-S1. He testified that he "couldn't figure out how I had got it . . . ."[3] He tried to think about how he could have hurt his back and the only thing that came to mind was the heavy labor he did at work. Claimant was referred by Dr. Fesler's office to Dr. Christopher Boxell. He obtained another off-work slip until he could be seen by Dr. Boxell.

That same day, claimant called respondent and told them he had a herniated disk. He also called an attorney. The attorney told him that he needed to notify respondent that his injury was work related. Both claimant and his wife then tried to telephone respondent's human resources department to report the injury as being work related. They left voice mail messages with respondent, but no one from respondent returned their calls. Claimant even complained to his union representative that he was trying to report a work-related injury to respondent but nobody at human resources was returning his calls. Claimant was not asked and the record does not otherwise indicate what specific messages claimant left on respondent's voice mail, *i.e.*, whether he said anything about a work-related injury or instead just left his name and number.

On May 13, claimant went to the human resources department at respondent and visited with Jack Kerns. He gave Mr. Kerns the papers from the doctor and reported the injury as work related. Mr. Kerns told him that if he filed a claim, it would be denied and advised him to drop it. Claimant stated that he tried to file a written claim on several occasions but was unable to do so.

Claimant was seen by Dr. C. G. Covington on May 23, 2005, at which time he complained of low back pain radiating into his hips and down his left leg and, on occasion, in his right leg. He described his work as lifting anywhere from 30 to 80 pounds and at times being in awkward positions while lifting and moving his weight. Dr. Covington recommended an epidural steroid injection at the L5-S1 level and a transforaminal steroid injection at S1. He also sent claimant to physical therapy.

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[2] P.H. Trans. at 15.

[3] *Id.* at 18.

Claimant was next seen by Dr. Boxell on June 29, 2005, at which time he reported that the epidural steroid injection had reduced his back pain. Claimant reported that he had no severe catches in his back for two weeks and the pain in his legs had been relieved. Although claimant asked to be released to work, Dr. Boxell kept him on off-work status and sent him back to physical therapy.

By August 10, claimant reported that the pain in his back was less and he had no leg pain. Dr. Boxell released him to return to light-duty work as of August 15 with no lifting over 25 pounds and limited bending at the waist. Claimant was also to avoid work that would require hyperextension of the back and overhead use of the arms.

Claimant returned to light duty work at respondent. Although he was only lifting parts that weighed about 12 pounds, he reported that his back pain has again worsened and his left leg went numb. Claimant returned to Dr. Boxell on October 12, 2005, at which time Dr. Boxell opined that his problems "are related to disk degeneration and exposure to heavy manual labor over the years."[4] Dr. Boxell recommended a lumbar discography and, depending on the outcome, possible surgery.

Claimant was seen by Dr. John Munneke at the request of respondent on September 13, 2005. Dr. Munneke stated that based on claimant's medical records, it was his opinion that claimant did not sustain a work-related injury but, instead, sustained a non-work-related injury while he was turkey hunting. Dr. Munneke opined that claimant was at maximum medical improvement and suggested he undergo a functional capacities evaluation. Other than that, Dr. Munneke believed that claimant needed no further medical care.

Claimant testified that although he hunted, fished, and played with his children, he did not believe that any of those activities were heavy enough to have caused his injury and were lighter than the work he did at respondent. He admitted that he did not know if his pain was caused by the lifting, bending, twisting, or stooping. He is not aware of any specific incident at work that caused his back to hurt. He had experienced back pain at work on prior occasions but never had pain going down his leg before. When claimant was asked whether he had reported those previous episodes of back pain to anyone as work related, claimant answered:

> No. Just talking with the supervisor or a friend and the supervisor standing there talking and saying man, my back is killing me tonight, not going to have a very good night production wise because that is what they worry about.[5]

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[4] P.H. Trans., Cl. Ex. 2 at 1.

[5] P.H. Trans. at 31-32.

Claimant admitted that after his April 22 injury when he went to respondent to turn in his off-work slips, he did this in person but thereafter when he was trying to report his injury as work related he tried to do this by telephone. He explained that he had never filed a claim before and had no idea what he was supposed to do.

K.S.A. 44-520 provides:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duty authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

Excluding intervening Saturdays and Sundays, the tenth day following claimant's alleged April 22, 2005, accident is Friday, May 6, 2005. Claimant was advised of the results of his MRI on May 2, and he and his wife began calling respondent's human resources department that same day. Notice of a work-related injury was not accomplished, however, until May 13, when claimant went to respondent's human resources office in person and spoke with Mr. Kerns. Respondent had been aware since April 24 that claimant was receiving treatment. And despite knowing that claimant was missing work due to his back problems and knowing the heavy nature of claimant's work, it apparently did not occur to anyone at respondent to inquire whether the condition was work related. Conversely, claimant either had not made the connection himself or was not interested in reporting a work-related accident until after receiving the MRI results. The ALJ determined that "[u]nder these circumstances, notice is appropriate due to the phone calls to Respondent within the ten day period. Further the Claimant's provision of off work slips put Respondent on notice that something was afoot, which was reported to them when Claimant discovered his actual condition."[6] The Board agrees that claimant's failure to notify respondent that his condition was work related was due to just cause.

[6] ALJ Order (Apr. 13, 2006) at 1.

The Board also agrees with the ALJ's conclusion that claimant's testimony, coupled with Dr. Boxell's causation opinion, are sufficient to meet claimant's burden of proving his injury arose out of and in the course of his employment with respondent.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Thomas Klein dated April 13, 2006, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of July, 2006.

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BOARD MEMBER

c: Kala Spigarelli, Attorney for Claimant
Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director